

**FOR CONSIDERATION AT THE JULY 21, 2016 MEETING OF THE  
NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL  
Petition for Plan Conformance—Final Consistency Review and Recommendations Report**

**APPENDIX A**

**PUBLIC COMMENTS/HIGHLANDS COUNCIL RESPONSES**

**Petition for Plan Conformance**

**Chester Borough, Morris County**

**Public Comment Period: June 17, 2016 – July 5, 2016**

**PUBLIC COMMENTS RECEIVED**

Written comments regarding Clinton Township's Petition for Plan Conformance were accepted by the Highlands Council from June 17, 2016 through the close of the Public Comment Period on July 5, 2016. Comments were provided by the following individuals/entities:

1. Sean Gilson, on behalf of New Jersey Highlands Coalition
2. Nicholas R. Homyak
3. Henry L. Kent-Smith, Esq., representing Turkey Farm Acquisition, LLC and West Chester Acquisitions, LLC
4. Laura Smith-Denker, on behalf of Fair Share Housing Center
5. Wilma Frey, on behalf of New Jersey Conservation Foundation

The comments are summarized in the section that follows with Highlands Council responses provided below, for each.

**PUBLIC COMMENT/RESPONSE SUMMARY**

**1. Gilson**

**Comment** (NJ Highlands Coalition): Mr. Gilson, on behalf of the New Jersey Highlands Coalition, supports Chester Borough's Petition for Plan Conformance and applauds the Borough's decision to adopt the best possible planning objectives for the benefit of the Community. The Coalition supports the Borough's proposed Housing Element and Fair Share Plan noting that it is responsive to available water and wastewater capacity and supports the Borough's Environmental Resource Inventory.

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**Response:** The Highlands Council acknowledges and thanks Mr. Gilson and the Highlands Coalition for the comments.

**2. Homyak**

**Comment** (Mr. Homyak): Mr. Homyak's comments are broad in nature and are supportive of the Highlands Council. Specifically, Mr. Homyak is supportive of the Highlands Act's approach for calculating water availability based on the drought of record.

**Response:** The Highlands Council acknowledges and thanks Mr. Homyak for his comments.

**3. Kent-Smith**

**Comment** (Turkey Farm Acquisitions, LLC and West Chester Acquisitions, LLC): Mr. Kent-Smith, attorney representing Turkey Farm Acquisition, LLC and West Chester Acquisitions, LLC, concerning property located at the intersection of Routes 206 and 24 in Chester Borough (Block 101, Lots 12.07-12.10, 12.22, 13, 14, 15, and 16, including property on Mill Ridge Lane and the "Turkey Farm"), provided comments on Chester Borough's Petition for Plan Conformance, including "as comments," copies of four (4) professional certifications apparently prepared for purposes of proceedings in the Superior Court of New Jersey Law Division – Morris County, concerning Docket No. MRS-L-1661-15. The certifications include one by each of the individuals listed below.

- Tony DiLodovico, Graduate Engineer, retained by Turkey Farm Acquisitions, LLC and W. Chester Acquisitions, LLC "to assist in this litigation regarding the NJDEP permit requirements associated with development of a sewage treatment package plant on Turkey Farm's property in the Borough of Chester."
- Art Bernard, PP, Professional Planner and Managing Member of Art Bernard and Assoc., LLC, retained by Turkey Farm Acquisitions, LLC and W. Chester Acquisitions, LLC "to assist in its litigation with the Borough of Chester."
- Bryon DuBois, Certified Professional Wetland Scientist and Certified Senior Ecologist and President and a Senior Environmental Scientist of DuBois Environmental Consultants, LLC, retained by Turkey Farm Acquisitions, LLC and W. Chester Acquisitions, LLC "to assist in this litigation and to perform a habitat assessment relative to the development of a sewage treatment package plant of the client's property in the Borough of Chester."
- David N. Kinsey, PhD, FAICP, PP, Professional Planner and partner in planning consulting firm, Kinsey & Hand, retained by Fair Share Housing Center "for advice and assistance in the implementation of Mount Laurel IV, including this litigation concerning the compliance of the Borough of Chester, Morris County, New Jersey with its constitutional fair share housing obligations."

The comments of Mr. Kent-Smith summarize and are supported by the professional opinions expressed in the above-listed certifications, and as Counsel for Turkey Farm Acquisitions, LLC and West Chester Acquisitions, LLC are the comments summarized herein, with Highlands Council responses to each, following.

- a) Mr. Kent-Smith notes that the Borough's wastewater treatment facility is at capacity while a significant number of septic systems in the Borough have failed or are failing. Mr. Kent-Smith calls for the Borough's Petition for Plan Conformance to be "summarily rejected" based on the refusal of the

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Borough to endorse and support the creation and development of a package treatment plan on his client's property. The commenter states that the development of a package treatment plan on his client's property could be used to connect failing septic systems in the Borough to treat effluent effectively while eliminating nitrates and recharging the aquifer below.

- b) Mr. Kent-Smith states that designation of his Client's Mill Ridge Lane property as Forest Preservation zone is inappropriate since the property has been approved and partially developed for single-family homes on potable wells and septic systems which would result in the property being fully disturbed. Mr. Kent-Smith states that for these reasons the environmental and forest preservation goals have already been lost as they relate to the property and feels that endorsing a plan that would allow millionaires to reside on this sensitive land but exclude more environmentally-friendly lower-income persons, is unjust and without any basis in any reasonable environmental protection policy. Mr. Kent-Smith further states that his client has proposed to develop the properties for a mixed-use development that includes 22 affordable rental apartments as part of a 144-unit rental complex. The project's 15% rental set-aside comports with COAH standards and, with retail/commercial development proposed on the Turkey Farm property, provides sufficient return to fully subsidize the development of a 60,000 GPD membrane sewage treatment package plant.
- c) The commenter also notes that the mapping of threatened and endangered species on his client's property is "aggressive" as described by certification in Exhibit B of this comment. Mr. Kent-Smith states that his client has already preserved 44 acres of forested area immediately to the north of the subject property which should provide more than ample mitigation for any potential adverse environmental outcome associated with the development of his client's property.
- d) Finally, Mr. Kent-Smith states that the Borough's Petition is deficient because it does not provide a realistic opportunity for satisfying its regional fair share of affordable housing (Exhibit C). Commenter further notes that the Borough's calculation of its affordable housing obligation will be rejected by the court, stating that the court will establish the Borough's affordable housing obligation, as well as whether the Borough's compliance mechanisms meet the "realistic opportunity" mandate of the Mount Laurel doctrine and Fair Housing Act. Mr. Kent-Smith states that the Borough's plan envisions 100% affordable housing projects that require additional sewer or septic service, and that the plan fails to address the present public health crisis associated with the Borough's failed sewer and residential septic systems.

**Response:** The Highlands Council acknowledges and thanks Mr. Kent-Smith and Turkey Farm Acquisition, LLC and West Chester Acquisitions, LLC for the comments.

- a) The Highlands Council is aware of Chester Borough's limited wastewater treatment capacity, as well as its problems with failed or failing septic systems. In response, the Highlands Council is proposing funding, as a component of Petition approval (under section 7d1 of the Implementation Plan and Schedule), for an innovative alternative wastewater treatment evaluation to be completed by the Borough. During this process, the Highlands Council will work closely with NJDEP and the Borough to ensure that any site(s) selected for a wastewater treatment facility meets the goals, policies and objectives of the Highlands Regional Master Plan and the Highlands Act.

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- b) Reference to a “Forest Preservation Zone” appears to refer to RMP designation of portions of the subject properties as Forest Resource Area and/or Total Forest Area. These designations are technical in nature, deriving from GIS mapping and technical reports completed by the Highlands Council in support of adoption of the Highlands RMP in 2008. As noted in the draft Highlands ERI, “the Highlands Council spatially delineated the Forest Resource Area by including those forested areas that express one or more of the following indicators – a contiguous forest patch of equal to or greater than 500 acres in size, an area consisting of >250 acres of core forest area greater than 300 feet from an altered edge, or areas that include >45% of mean total forest cover, and mean distance to nearest patch (HUC14 only).” The Total Forest Area includes all portions of the Region identified by the Highlands Council as containing “forest,” as the term is defined under NJDEP Highlands Rules (NJAC 7:3-3.9). While these designations do have implications for future development in conforming Planning Area municipalities, it should be noted that in the case of unexpired development approvals this is not the case. Provided such approvals retain legal status as of the date of adoption of a municipality’s Highlands Land Use Ordinance (or Checklist Ordinance), they are not subject to the changes such ordinances introduce to municipal zoning provisions.
  
- c) As to the mapping of threatened and endangered species habitat, the NJDEP’s Nongame and Endangered Species Program (ENSP) uses the Landscape Project to identify potential habitats for rare, threatened and endangered wildlife. The RMP uses the Landscape Project data to map Critical Wildlife Habitat throughout the Highlands Region.
  
- d) With regard to the Borough’s Housing Element and Fair Share Plan, as the commenter notes, Chester Borough is currently engaged in litigation in Superior Court for determination of its affordable housing obligation. We agree, and acknowledge in the Report, that the Borough’s fair share obligation will be determined by the court and court approval of the Borough’s Housing Element and Fair Share Plan is a continuing condition of the Borough’s Plan Conformance approval (condition D.1.g). As for any need to update that may be necessary, a component of Petition approval proposes grant funding (under section 1 of the Implementation Plan and Schedule) for updates to the Borough’s Build-Out Analysis and Housing Element and Fair Share Plan. An update of the Build-Out Analysis may take place shortly after the Petition for Plan Conformance is approved by the Highlands Council.
  
- e) Finally, the Borough of Chester’s Petition for Plan Conformance has been recommended by Highlands Council staff to be “Approved with Conditions.” One such condition is that the Borough adhere to the approved Highlands Implementation Plan & Schedule. Adherence requires that the Borough undertake all mandatory Plan Conformance activities listed in the Highlands Council-approved Implementation Plan & Schedule, in accordance with: a) the timeframes set forth therein, to the maximum extent feasible and practicable, or with such adjusted timeframes as may be authorized by the Highlands or otherwise mutually agreed by the municipality and the Highlands Council; and b) the availability of funding from the Highlands Council or, on a voluntary basis, by the municipality or other party, to ensure the satisfactory completion of each project or activity, or each phase of such project or activity, as appropriate.

**4. Kinsey**

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**Comment** (Fair Share Housing Center): David N. Kinsey, PhD, FAICP, PP (same author as above-referenced, in Kent-Smith/Turkey Farm Certifications) provided comments on behalf of the Fair Share Housing Center, which were submitted by Ms. Smith-Denker.

- a) Mr. Kinsey disagrees with the statement by the Highlands Council that Chester Borough is “actively in compliance with the March 2015 court decision.” Mr. Kinsey states that the Borough is either in compliance or not and it is his opinion that the Borough is not in compliance.
- b) Addressing the 2009 Build-Out Analysis completed by the Highlands Council, Mr. Kinsey states that the Borough recognizes an obligation for just 2 affordable units based on a build-out capacity of 9 units. Mr. Kinsey states that the Borough’s fair share housing consultant, Econsult, has determined that the Borough’s affordable housing obligation is 50 units according to its 2016 Housing Element and Fair Share Plan and that Econsult’s most recent, May 2016 determination is 58 units. In Mr. Kinsey’s opinion, however, the Borough’s obligation is 124 units.
- c) Mr. Kinsey states the Highlands Council should be aware of the limitations of its 2009 Build-Out Report stating that “the Highlands Council Build-Out Model is not intended to be applied at a parcel level to determine the development potential of that parcel.” Mr. Kinsey states that a Realistic Development Potential Analysis has been performed on a parcel-by-parcel basis and that a proper analysis is conducted without being entirely bound by existing zoning, because the purpose of the analysis is to determine how much affordable housing can reasonably be produced if zoning is changed.
- d) In summary, Mr. Kinsey recommends that the Highlands Council deem the Borough’s Petition inconsistent with the RMP.

**Response:** The Highlands Council acknowledges and thanks Mr. Kinsey, Ms. Smith-Denker, and the Fair Share Housing Center for the comments.

- 1) As to the Borough’s Housing Element and Fair Share Plan, Chester Borough has engaged the courts with regard to its affordable housing obligation, as required by the Highlands Council. Only the court can determine whether the Borough’s Housing Element and Fair Share Plan satisfactorily addresses its affordable housing obligation. Beyond requiring compliance with the Fair Housing Act, the Highlands Council’s role is limited to review of affordable housing development proposals for consistency with the RMP.
- 2) The Highlands Council’s approval of the Borough’s Petition proposes to include funding for updates to the Borough’s Build-Out Analysis and Housing Element and Fair Share Plan (see section 1 of the Implementation Plan and Schedule). In response to the March 2015 Supreme Court ruling, the Highlands Council launched a revised grant program that assists municipalities in updating Build-Out Reports and Housing Elements and Fair Share Plans.
- 3) The updated Build-Out Report that will be completed by the Borough does not use municipal zoning. An update of the Build-Out Analysis may take place shortly after the Petition for Plan Conformance is approved by the Highlands Council. A revised Housing Element and Fair Share Plan will be completed as appropriate based on the decision of the courts.

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- 4) Finally, the Borough of Chester’s Petition for Plan Conformance has been recommended by Highlands Council staff to be “Approved with Conditions.” One such condition is that the Borough adhere to the approved Highlands Implementation Plan & Schedule. Adherence requires that the Borough undertake all mandatory Plan Conformance activities listed in the Highlands Council-approved Implementation Plan & Schedule, in accordance with: a) the timeframes set forth therein, to the maximum extent feasible and practicable, or with such adjusted timeframes as may be authorized by the Highlands or otherwise mutually agreed by the municipality and the Highlands Council; and b) the availability of funding from the Highlands Council or, on a voluntary basis, by the municipality or other party, to ensure the satisfactory completion of each project or activity, or each phase of such project or activity, as appropriate.

**5. Frey**

**Comment** (NJ Conservation Foundation): Ms. Frey, on behalf of the New Jersey Conservation Foundation provided comments in support of Chester Borough’s Petition for Plan Conformance. Specifically, Ms. Frey commends the Borough’s recognition of its historic, cultural, and archeological resources, as well as its intention to protect scenic resources. Ms. Frey also recognizes that two HUC 14 subwatersheds within the Borough are in deficit and supports the Borough’s acknowledgements that “the availability of water for human use is a critical factor in determining the capacity for growth and continued economic vitality in the Borough,” and that “the availability of water for ecological purposes is critical to sustaining the aquatic ecosystems of streams, ponds and lakes,” and that “of particular concern to the Borough is the potential for overuse of water to reduce base flows, impair ecological function and integrity, and reduce the reliability of potable water supplies that the municipality depends upon.”

**Response:** The Highlands Council acknowledges and thanks Ms. Frey for her comments.